

Appl. No. 10/730,438
Atty. Docket No. CM2713Q
Amdt. dated October 5, 2007
Reply to Final Office Action of August 9, 2007
Customer No. 27752

REMARKS

Claim Status

Claims 1 – 9 are pending in the present application. No additional claims fee is believed to be due.

Claim 1 has been amended to include the feature of one or more pigments dispersed throughout a polymeric material.

Rejection Under 35 USC §102 Over Noda

Claims 1 and 2 have been rejected under 35 U.S.C. §102(e) as being anticipated by U.S. Pat. No. 6,949,689, issued to Noda, *et al.*, (hereinafter “Noda”). Applicants respectfully traverse the rejection.

A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Applicants submit that Noda does not teach each and every element recited in claim 1 of the present application.

Claim 1 recites, *inter alia*, said polymeric film and said nonwoven web both comprise a polymeric material, wherein at least one of said polymeric materials of said film or of said nonwoven web is colored by one or more pigments dispersed throughout said polymeric material.

The Office Action states “[i]n response to Applicant’s argument . . . it is noted that the features upon which applicant relies (i.e., ‘[a] coloring agent used to color-pigment the nonwoven web and/or polymeric film . . . is added before melting the thermoplastic material comprised by the nonwoven web and/or polymeric film.’) are not recited in the rejected claims.” (The Office Action, page 5).

Applicants appreciate that limitations from the specification are not read into the claims. (*In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993)). However,

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Applicants respectfully remind the Office that neither are the claims to be read in a vacuum. (*In re Marosi*, 710 F.2d 802, 218 USPQ 292 (Fed. Cir. 1983)). Applicants' argument, as referred to in the Office Action, was an attempt to interpret an element of claim 1, specifically the element "comprised within said polymeric material." Applicants have amended claim 1 to recite "dispersed throughout said polymeric material" in an effort to further clarify this element. Notwithstanding the amendment to claim 1, Applicants continue to assert that the colored polymeric material recited in claim 1 is not the same as a polymeric material having ink printed thereon.

In support of Applicants' position that the printed graphics of Noda are not the same as the colored polymeric material recited in claim 1 of the present application, Applicants would like to point out that the "Background of the Invention" of the present application clearly discloses the disadvantages of printing on large areas of the backsheet of a diaper, and that it is an object of the invention to overcome at least some of these disadvantages. (The present application, page 2, line 15-page 3, line 29). The present application then discloses exemplary ways to provide a polymeric material having color pigments dispersed therethrough. (The present application, page 9, lines 1-7). Thus, Applicants submit that when claim 1 is read in light of the specification, a polymeric material having color pigments dispersed therethrough, as recited in claim 1, is not the same as a polymeric material having color pigments printed thereon.

In addition, Applicants submit that one of ordinary skill in the art would recognize that a thermoplastic substrate may be formed when a thermoplastic material such as a thermoplastic polyolefin is melted, subjected to a particular process (e.g., an extrusion process), and then cooled to produce the desired substrate. Applicants further submit that one of ordinary skill in the art would recognize that when a thermoplastic material cools, it may undergo a crystallization process, and any color pigment present in the melted thermoplastic will likely be trapped in the crystalline matrix of the cooled thermoplastic. (See, for example, the present application, page 7, lines 4-32; page 9, lines 1-7; <http://en.wikipedia.org/wiki/Thermoplastic>; and http://en.wikipedia.org/wiki/Plastics_extrusion). The "trapped" color pigment may then impart a color to the polymer. Thus, it is Applicants'

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position that a polymeric material having color pigments dispersed in the crystalline matrix of the polymeric material is not the same as having color pigments printed on the surface of the polymeric material. By way of analogy, Applicants submit that a blue sapphire and a piece of colorless Aluminum Oxide (i.e., corundum) that has been painted blue are not the same thing. (See <http://en.wikipedia.org/wiki/Sapphire>).

The Office Action states that “the ‘printed area’ of Noda is being interpreted to include areas away from ornamental designs.” (The Office Action, page 6). The Office Action offers no reason for this interpretation nor does it point to any portion of Noda that would lead one of ordinary skill in the art to understand “printed area” to include areas not containing printing. As best understood by Applicants, the Office’s interpretation of “printed area” is clearly contrary to the plain meaning of the term as it is disclosed in Noda, and is therefore improper.

The Office further states that “[s]ince the disclosed measures of L-value, b-value and c-value represent an overall measure, areas substantially away from ornamental designs are capable of having values within the claimed ranges.” (The Office Action, page 6).

Claim 1 recites, *inter alia*, said backsheet in said overlaying region has a L Hunter value on the Hunter scale for darkness/lightness-appearance from 10 to 75, an “a” value for red/green-appearance from about -50.0 to about +50.0 and an “b” value for yellow/blue-appearance from about -50.0 to about +50.0 in the areas outside the printed ornamental designs.

First, Applicants would like to point out that claim 1 does not recite a c-value. Applicants are unable to find any disclosure in the Office Action pointing to the particular portion of Noda relied upon to teach the a-value recited in claim 1 of the present application, as is required under 37 C.F.R. §1.104(c)(2). Therefore, for at least this reason, the rejection of claims 1 and 2 under 35 U.S.C. §102(e) should be withdrawn.

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Second, and as best understood by Applicants, it is only in printed areas that Noda discloses L-values that fall within the range recited in claim 1 of the present application. (See, Noda, col. 1, lines 60-62). Noda discloses that “[t]he non-printed area of the breathable film 3a, i.e., the background tends to suffer from yellowing by the action of light or heat during storage causing reduction of the clearness of the pattern printed in multicolor.” (Noda, col. 4, lines 51-54) (emphasis added). Noda further discloses that “[t]he L*, a*, b*, and C* values of the background were 96, 0, -0.1, and 0.1 respectively.” (Noda, col. 7, lines 47-40) (emphasis added). Thus, Applicants submit that Noda clearly discloses the area of the substrate outside the printed area as having an L-value outside that recited in claim 1 of the present application.

In light of the above remarks, it is Applicants’ position that, at the very least, Noda does not teach the recited L-value and a-value recited in claim 1 of the present application, and therefore does not teach each and every element of claim 1 or any claim depending therefrom. Accordingly, Applicants respectfully request that rejection of claims 1-2 under 35 U.S.C. §102(e) be reconsidered and withdrawn.

Rejection Under 35 USC §103 Over Tao in View of Rogers

Claims 1 and 3-7 have been rejected under 35 U.S.C. 103(a) as being unpatentable over PCT Pub. No. WO99/32164, to Tao, *et al.*, (hereinafter “Tao”) in view of U.S. Pat. No. 5,133,707, to Rogers, *et. al.*, (hereinafter “Rogers”) Applicants respectfully traverse the rejection.

In order to make out a *prima facie* case of obviousness, three requirements must be met. First, there must be some suggestion or motivation to combine the sources, second, there must be a reasonable expectation of success and lastly, the prior art references must teach or suggest all the claimed limitations of the present invention. (MPEP §2143).

As best understood by Applicants the combination of Tao and Rogers does not teach or suggest a polymeric material colored by one or more pigments dispersed throughout said polymeric material. As pointed out above with regard to the rejection

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over Noda, the pigments disclosed in Tao and Rogers are inks that are merely printed onto the surface of the substrate. The pigments that color the polymeric material recited in claim 1 of the present application, on the other hand, are dispersed throughout the polymeric material. Therefore, it is Applicants' position that the article recited in Tao is not identical or substantially identical in structure or composition to the backsheet recited in claim 1 of the present application.

A "proposed modification cannot render the prior art unsatisfactory for its intended purpose or change the principle of operation of a reference." (MPEP §2143.01). In the present case, Applicants submit that the modification of Tao in view of Rogers as proposed by the Office Action is contrary to the disclosure of Tao and would render Tao unsatisfactory for its intended purpose.

Tao states "[i]t has also been found that a **high degree of whiteness . . .** is very important to the consumer." (Tao, page 2, lines 23-25) (emphasis added). Tao also states "[i]t is believed that **any such yellow shade is highly unacceptable** to consumers, who tend to prefer a **bright, intense white appearance.**" (Tao, page 4, lines 15-17) (emphasis added). In an example that "describes and demonstrates a preferred embodiment of the microporous polymer film" of Tao, the L-Hunter value is disclosed as 93.46. (Tao, page 12, lines 21 - 22; Tao, middle of page 13). Tao states that "L' is a measure of the lightness of a sample ranging from L=0 (blackness) to L=100 (whiteness). As best understood by Applicants, Tao is disclosing that an L-value as close to 100 as possible is desirable for the polymer film of Tao.

Completely contrary to the express disclosure in Tao, however, the Office Action proposes a modification that would **lower** the L-value of the polymer film of Tao to fall within the range recited in claim 1 of the present application. Applicants submit that such a modification is improper under MPEP §2143.01(V).

The Office Action states that "using an L-value of 50-75 would not adversely affect the absorbent properties or appearance of the absorbent article of Tao." (The Office Action, page 7). However, the Office Action provides no support for this assertion. In

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limited circumstances it may be appropriate for the Office to take official notice of facts or to rely on common knowledge, but these circumstances should be rare when an application is under final rejection or action under 37 CFR §1.113. (MPEP §2144.03(A)). “[T]he notice of facts beyond the record which may be taken by the Examiner must be capable of such instant and unquestionable demonstration as to defy dispute.” (*In re Knapp Monarch Co.*, 296 F.2d 230, 132 USPQ 6 (CCPA 1961)). In light of the disclosure in Tao that any such yellow shade is highly unacceptable, Applicants submit that the Office’s assertion is not capable of instant and unquestionable demonstration, as set out in *Knapp. (Id.)*.

The Office Action states that “Rogers discloses a composite adhesive fastening tape 2 for use with diapers . . . wherein the L value is a result effective variable since the higher the L value the better results in an improved obscuring effect.” (The Office Action, page 3). Even assuming, *arguendo*, that the Office’s assertion is correct, it would mean that one of ordinary skill in the art would merely seek to optimize the obscuring effect by obtaining the highest L-value possible (i.e., 100), and not the L-value range recited in claim 1.

The Office Action states “said graphic not covering more than about 60% of the back sheet (figures 1-4).” (The Office Action, page 3). Applicants would like to point out that claim 5 recites, *inter alia*, ornamental designs comprising not more than 50% of at least one of the two major surfaces of said backsheet. Applicants are unclear as to whether the Office was addressing the rejection of claim 5 or 6, but will respond to a rejection of claim 5 since the language in the Office Action most closely resembles the elements recited in claim 5. If this assumption is incorrect, Applicants request clarification in the next Office Action.

“It is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.” (*Hockerson-Halberstadt, Inc. v. Avia Group Int’l*, 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000)). As best understood by Applicants, Tao is silent as to the dimensions of the graphics. Thus, it is Applicants’

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position that the Office's reliance on figures 1-4 of Tao to support a *prima facie* case of obviousness with regard to claim 5 is improper.

In light of the above remarks, Applicants respectfully submit that the Office Action has failed to make a *prima facie* case of obviousness with regard to claim 1 or any claim depending therefrom. Accordingly, Applicants respectfully request that the obviousness rejection of claims 1 and 3-7 over Tao in view of Rogers be reconsidered and withdrawn.

While the Office Action states that claims 1 and 3-7 have been rejected over Tao in view of Rogers, Applicants are unable to find any discussion in the Office Action addressing a rejection of claim 6 or 7. Absent such disclosure, Applicants respectfully submit that the finality of the present rejection is improper, and either the reasons for rejection of claims 6 and 7 should be stated or claims 6 and 7 should be listed as allowable subject matter.

Rejection Under 35 USC §103 Over Tao in View of McCormack

Claim 2 has been rejected under 35 U.S.C. §103(a) over Tao in view of Intl. Pub. No. WO00/38915, filed by McCormack, *et al.*, (hereinafter "McCormack"). Applicants respectfully traverse the rejection.

To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. (*In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974)).

As best understood by Applicants, McCormack does not overcome the same lack of disclosure of Tao. Specifically, Applicants are unable to find any teaching or suggestion in McCormack of a nonwoven web colored by pigments dispersed throughout said polymeric material, as is recited in claim 1. Therefore, Applicants submit that the combination of Tao and McCormack does not teach or suggest each and every element recited in claim 1 of the present application.

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The Office Action states "Tao does not expressly disclose opacity values." (The Office Action, page 4). The Office Action goes on to state "it would be obvious for one of ordinary skill in the art at the time the invention was made to modify Tao with the opacity" (The Office Action, page 4). As pointed out above, the proposed modification of Tao (*i.e.*, lowering the opacity value) is contrary to the express disclosure of Tao. (See Tao, pages 2-4), and is therefore improper under MPEP §2143.01(V).

The Office Action states that "[o]pacity is a well known result-effective variable that results in an improved color contrast for masking purposes as supported by McCormack." (The Office Action, page 4). As pointed out above, it is Applicants' position that one of ordinary skill in the art would simply seek to maximize opacity rather than obtain the range recited in claim 2.

In light of the above remarks, it is Applicants' position that the Office Action has not made a *prima facie* case of obviousness with regard to claim 2. Accordingly, Applicants respectfully request that the rejection of claim 2 under 35 U.S.C. §103(a) be reconsidered and withdrawn.

Rejection Under 35 USC §103(a) Over Tao in view of Schleinz et al.

Claims 8 – 9 are rejected under 35 U.S.C. §103(a) as being unpatentable over Tao in view of U.S. Pat. No. 5,612,188, issued to Schleinz, *et al.*, (hereinafter "Schleinz"). Applicants respectfully traverse the rejection.

The Office Action states "Tao does not expressly disclose a half-toning printing process in which one of the surfaces . . . is covered with an opaque or transparent ink while a second area is covered with the same ink." (The Office Action, page 4). The Office Action cites Schleinz for disclosure directed to a training pant having . . . a plurality of graphics . . . said graphics using a semi-tone/half-toning process on two different areas of the composite outer cover in order to eliminate blurred or ghost graphics." (Id). Applicants respectfully disagree with the Office's reading of Schleinz.

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As best understood by Applicants, Schleinz is directed to a printing process for printing **semi-tone graphics** (as opposed to a halftone printing process) on a gatherable substrate and when the substrate is gathered the graphics appear as full-tone graphics. (Schleinz, abstract; col. 2, lines 10 – 17). Schleinz discloses that “semi-tone graphic refers to a graphic that has been printed with an amount of ink less than a predetermined amount of ink required for a full-tone graphic.” (Schleinz, col. 6, lines 16 – 18). Schleinz also discloses that “a full tone graphic refers to a graphic that has been printed with a predetermined amount of ink that results in the desired definition, resolution, tone, color intensity, or the like.” (Schleinz, col. 6, lines 14 – 16).

In contrast to Schleinz, the present application states with regard to a halftone printing process

When a single color is applied on a white surface, it is possible to vary the intensity of this color e.g. by varying the add-on level of color per surface area (e.g. by varying the density of ink dots per surface area in a halftone process). It is thus possible to produce different shades of one color. It is, however, not possible to produce the effect of an additional second color by varying the add-on level on white surfaces.

Contrary, in the present invention it is possible to produce the effect of additional colors due to the color-pigmented surface whereon the ornamental designs are printed. For example, when non-transparent, opaque blue ink is printed on a yellow surface without covering the whole surface (e.g. by **allying small, discrete dots in a halftoning-process**), then such treated surface will be visually perceived as being green.

(The present application, page 11, lines 23 – 33, emphasis added). Applicants submit that Schleinz does not teach or suggest the halftoning printing process, as recited in claims 8 and 9.

It is Applicants' position that one of ordinary skill in the art would appreciate that Schleinz does not expressly disclose a halftone printing process (e.g., allying small discreet dots of ink on the surface of a substrate in various densities), as is recited in claim 8 of the present application. Rather, Applicants submit that one of ordinary skill would understand Schleinz to disclose a gatherable substrate having an elongated semi-tone graphic applied thereto such that when the substrate is gathered, resultant changes in the visual characteristics of the semi-tone graphic provide the appearance of a full-tone graphic. Applicants, however, are unable to find any teaching or suggestion in Schleinz

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that the density of the ink dots per surface area is, in fact, varied. Applicants would like to point out that while a substrate (such as the gatherable substrate of Schleinz) may contain elevated portions and unelevated portions when in a gathered configuration, the total surface area remains unchanged from the ungathered configuration, and therefore the density of ink (or ink dots) per surface area also remains the same.

The Office Action states “[t]he apparatus of Schleinz contains the structural limitation required to meet the claim language as discussed.” (The Office Action, page 8). However, the Office Action provides no reasoning or evidence to support this assertion. In light of the above remarks, Applicants submit that the Office Action has failed to make a *prima facie* case of obviousness with regard to claim 8.

In addition, Applicants are unable to find any statement in the Office Action or any disclosure in Tao or Schleinz directed to printing which is applied such that **the effect of an additional color is created** by covering at least a first area of at least one of said major surfaces of at least one of said polymeric film or said nonwoven web with opaque ink in a halftoning process while covering at least a second area completely with the same ink, as is recited in claim 8 of the present application. Absent such teaching or suggesting, Applicants submit that Tao in view of Schleinz does not teach or suggest each and every element of claim 8 of the present application.

With regard to claim 9, Applicants are unable to find any disclosure in Tao or Schleinz that teaches or suggests printing that is applied such that **the effect of an additional color is created** by covering at least a first area of at least one of said major surfaces of at least one of said polymeric film or said nonwoven web with a relatively thin layer of a **transparent ink** while applying a relatively thick layer of the same ink in at least a second area, as is recited in claim 9 of the present application. Since the Office Action fails to point to the particular part of Tao and/or Schleinz relied upon to teach or suggest each and every element of claim 9, as required under 37 CFR §104(c)(2), Applicants respectfully submit that the rejection is improper.

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The Office Action states "this effect is based on the perception of individual users. The inventions of Tao and SchleinZ are capable of having the same structural features as claimed." (The Office Action, page 8). Applicants respectfully disagree. The effect of additional colors can be objectively measured by a machine to produce, for example, a-values and b-values, and therefore is not necessarily based on the perception of individual users. (See page 13, line 18-page 14, line 24 of the present application).

The Office Action also states that "[t]he inventions of Tao and SchleinZ are capable of having the same structural features as claimed." (The Office Action, page 8). The Office has provided no support for this assertion, and therefore Applicants submit that it should not be used to support a *prima facie* case of obviousness.

In light of the above remarks, it is Applicants' position that the combination of Tao and SchleinZ does not teach or suggest each and every element recited in claim 8 or 9 of the present application. Accordingly, Applicants respectfully request that the rejection of claims 8 and 9 under 103(a) be reconsidered and withdrawn.

Conclusion

This response represents an earnest effort to place the present application in proper form and to distinguish the invention as claimed from the applied reference(s). In view of the foregoing, entry of the amendment(s) presented herein, reconsideration of this application, and allowance of the pending claim(s) are respectfully requested.

Respectfully submitted,

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